No. 13,746

IN THE

United States Court of Appeals

For the Ninth Circuit

CHOW SING, by his Guardian ad Litem, Chow Yit Quong,

Appellant,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States,

Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

The greater part of appellee's brief is devoted to contending that the trial Court did not have jurisdiction of the case, a contention, incidentally, which the appellee did not make in the Court below.

The appellee at page 8 in his brief states:

"Does the Court have jurisdiction of the appellant's claim under 8 U.S.C. 903?

A. Appellant had not resided in the United States prior to making his claim;

B. There was no denial of a "right or privilege" within the meaning of Section 903;

C. The only judicial remedy available to appellant is habeas corpus."

In his argument relative to jurisdiction, appellee discusses many matters which do not actually involve the jurisdiction of the Court, however, for the purpose of clarity we will discuss the above questions before proceeding to the main issue—the United States nationality of the appellant herein.

JURISDICTION.

To present a case within the jurisdiction of the federal Court, a plaintiff must state a cause of action of which the statutes give federal Courts jurisdiction, and whether the federal Courts may assume jurisdiction is determinable by the allegations of the complaint. As a general rule if the allegations of the bill in good faith make a claim within the jurisdiction of the Court, the Court has jurisdiction whether or not the claim is well founded.

Utah Fuel Co. v. National Bituminous Coal Commissioner, 59 S.Ct. 409, 306 U.S. 56.

APPELLEE'S SUBPARAGRAPH A.

It is asserted that "appellant had no residence in the United States upon which to found a claim of 'permanent residence' in that he had never previously been in the United States".

The term "claims a permanent residence" as used in the statutory language of Section 903, Title 8, relates to venue and not jurisdiction of the trial Court.

Also in support of his contention appellee relies upon and incorporates other briefs filed in this Court. In reply thereto appellant incorporates herein and makes a part hereof pages 14 to 21 of appellant's reply brief in *Fong Wone Jing, et al. v. Dulles,* No. 13745.

At pages 8 to 18 of appellee's brief in Fong Wone Jing, appellee contends for the proposition that the District Court is precluded from jurisdiction by the purposes and intent of Section 903, Title 8. Appellee thereupon concludes that the legislative purpose and intent was to restrict the benefits of that section to those who had theretofore resided in the United States and lost their United States citizenship by expatriation. Even cursory examination of the words of the statute reveals appellee's attempt to so stringently restrict the section's benefits to be error based upon a conclusion that cannot be drawn by application of any reasonable or logical method of statutory construction. Where the language of the statute is plain and unambiguous, there is no occasion for construction even though other meaning may be found; and the Court cannot indulge in speculation as to the probable or possible qualifications which might have been in the minds of the legislators, but the statute must be given effect according to its plain and obvious meaning.

U. S. v. Missouri Pacific Ry Co., 49 S.Ct. 133, 278 U.S. 269;

Commissioner of Immigration v. Gottlieb, 265 U.S. 310, 44 S. Ct. 258.

In the instant case the first three words of the particular section in question are: "If any person * * *." These words have a clear and concise meaning. The present appellant is a person for whom this judicial relief was enacted.

Appellee quotes at considerable length from Congressional debates upon the bill which became the Nationality Act of 1940. Nowhere in this discussion is there any indication that the provisions of this proposed amendment should be restricted to persons who lost citizenship through the expatriation clauses of Part IV thereof. As a matter of fact, it clearly appears that these provisions were to provide a judicial remedy for those whose United States citizenship was challenged by an administrative body. The statement of Mr. Rees, Congressional Record, Vol. 86, Part 12, page 13247:

> "For instance, take a man who is born abroad of American citizen parents. That person born abroad, born in Italy or Germany or France or whatever it may be, if his parents are American citizens he is an American citizen because he is the child of American citizens."

completely contradicts and defeats appellee's contention that the benefits of Section 903 are available only to those who lost citizenship by expatriation.

The same view was expressly approved by the Courts in:

Ow Yeong Yung v. Dulles, 116 F. Supp. 766, 768;

Look Yun Lin v. Acheson, 87 F. Supp. 463, 465;
Mah Ying Og v. Clark, 81 F. Supp. 696.

To conclude the discussion as to this phase of the argument, the Courts have uniformily rejected the proposition now urged by appellee. Moreover, the language of the section itself precludes such an interpretation. The effort to support the proposition by resort to the Congressional debate is likewise ineffectual.

APPELLEE'S SUBPARAGRAPH B.

It is asserted here that the District Court was without jurisdiction because the appellant was not denied a right or privilege within the meaning of Section 903.

Appellee has incorporated other briefs by reference. In reply thereto appellant incorporates and makes a part hereof pages 2 to 14 of appellant's reply brief in Fong Wone Jing.

Appellee blandly asserts that the exclusion of appellant by the Immigration Service "is not a denial of right or privilege of a national on the ground that he is not a national, but a determination that the individual is an alien."

It is not necessary for us to devote considerable attention to the niceties of construction of the term "rights or privileges as a national." It is not necessary to even define or delineate such rights or privileges. There are certain inherent and fundamental rights guaranteed to a United States citizen or na-

tional by the constitution of the United States. One such fundamental and inherent right of a United States citizen or national is a right to partake of the privileges granted to other members of the same class. It is a deprivation of "life" and "liberty" to deny a United States citizen or national the right to reside within the confines of this nation. Banishment and exile is contrary to the precepts of the Constitution of the United States. A restraint on the right of a United States citizen or national to enter this country is a violation of personal liberty and a denial of a right or privilege.

As we further understand the appellee's point, it is this: Granting that plaintiff is a national and has been denied a right or privilege as a national, there still remains the fatal deficiency that it is not alleged or proven that the denial by the appellee was based on the ground that the "appellant was not a national". Does the appellee come before this Court and say that no Court may entertain a suit of this nature unless I decide to reject a United States claimant in the statutory language? If we were to accept the appellee's contention it would be possible for this appellee or any other administrative agency of the government to deny all United States national claimants the right to a day in Court in accordance with the provisions of Section 903. The act would become a nullity. The rights and privileges of United States nationals would then be governed by a play on words.

It is not necessary that the allegation asserting a denial of a right or privilege be in the statutory lan-

guage. The Court can look to the substance and not to the form. What was the practical effect, in this case, when the Immigration Service made a determination that the appellant was an alien?

The Nationality Act of 1940 provided:

For the purposes of this chapter:

(a) The term "national" means a person owing permanent allegiance to a state.

(b) The term "National of the United States" means (1) a citizen of the United States, or (2) a person who, though not a citizen of the United States, owes permanent allegiance to the United States. *It does not include an alien.* (8 U.S.C.A. 501.) (Italics ours.)

The immigration laws of the United States in effect at the time of this appellant's application for admission to the United States as a citizen thereof provided:

"The word 'alien' wherever used in this chapter shall include any person not a native-born or naturalized citizen of the United States;" (8 U.S.C.A. 173).

It was stated by the Court of Appeals for the Second Circuit in *Scholz v. Shaughnessy,* 180 F. 2d 450, that:

"For the purposes of the Nationality Act a 'national of the United States' is either a 'citizen' or 'a person who, though not a citizen * * * owes permanent allegiance to the United States.' The word 'does not include an alien'. The word 'alien' in the Immigration Act meant 'not a native-born or naturalized citizen'; and presumably that is

its meaning in the Nationality Act. In any event the relator is an alien and an alien is not a 'national of the United States'."

The record establishes that the appellant applied for admission to the United States as a citizen thereof; that the appellee found the appellant to be an alien; and that the appellee ordered the appellant deported as an alien. The net result is that the appellee refused to recognize or admit the United States nationality of the appellant. The cases cited by appellee at page 10 in his brief are all on appeal awaiting determination of this Court. Compare the more recent decision of Judge Roche in *Ow Yeong Yung v. Dulles,* supra.

From the foregoing it must be concluded that a right of action accrued to this appellant when the Immigration Service refused to recognize the appellant's claim to United States nationality. The order of deportation of appellant as an alien was a denial of a right or privilege upon the ground that appellant was not a national of the United States.

APPELLEE'S SUBPARAGRAPH C.

Appellee urges that appellant's sole remedy is by way of habeas corpus. In support thereof he cites numerous cases which were decided prior to the Nationality Act of 1940. In the case at bar the proceeding is a suit brought under an Act of Congress which expressly authorizes such an action. This statute was

not in being when any of the cases cited by appellee were determined.

The Court of Appeals for the District of Columbia and the Second Circuit have both held that an appellant who was born in China of an alleged American citizen parent was entitled to have his citizenship judicially determined under Section 903.

Mah Ying Og v. McGrath, 187 F. 2d 199, 201;
Chu Leung v. Shaughnessy, 176 F. 2d 249, 250.

The case of *Heikkila v. Barber,* 345 U.S. 229, cited by appellee at page 12 is not in point. As stated by appellee the case "involved the question of the judicial remedy available to an *alien* whom immigration sought to deport." We are here confronted with the right of a citizen and not an alien. The appellant is entitled to the judicial relief afforded by congressional enactment. This view is supported by a long line of judicial precedents.

THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT ARE ERRONEOUS.

In reply to appellee's brief the appellant incorporates and makes a part hereof pages 23 to 32 of appellant's reply brief in the case of Fong Wone Jing. The appellee admits that the contention of appellant, as to the quantum of evidence required to establish the citizenship rights of people similarly situated, has been consistently followed by the Immigration Service for an untold number of years. (p. 17.) It is well

recognized that such an administrative practice is not binding upon this Court, but it is offered to establish the harmony of appellant's proposition and prior administrative practices.

Reference is made to the cases cited at page 26 of appellee's brief. Those cases were determined under the applicable provisions of the Chinese Exclusion Act. That Act specifically provided that a person of the Mongolian race was presumed to be an alien. However, the Act was repealed in its entirety on December 17, 1943, 57 Stat. 600.

Without being repetitious we once again assert that the cases cited in our opening brief clearly establish that the findings of fact, conclusions of law, and judgment of the lower Court are erroneous. Appellee has not cited any cases which overrule these judicial precedents. He seeks to avoid the effect of the doctrine expressed in those opinions by asserting that in those cases the Court was in error.

Remarks of appellee at pages 17, 23 and 31 veer sharply to accusation rather than legal reasoning. These statements might have value as a basis for moves to impeach members of the Court or investigate past actions of the Immigration Service, but they fail to contribute toward solution of the issues here and we would suggest that they be disregarded.

THE EVIDENCE.

The lower Court concluded that the "evidence presented by plaintiff does not conform to the standards fixed in *Ly Shew v. Acheson,* #30159 and #31161, this day decided." (T. 21.) (110 F. Supp. 50.)

In arriving at the standards to be applied to a case of this nature, including the instant matter, the lower court considered extraneous and immaterial matter which had no relevant bearing on the issue before the Court. We cite only a few:

1. The fact that the witnesses cannot speak a word of English (page 52).
2. The mutuality of facts as set forth in the case of *Mar Gong v. McGranery,* 109 F. Supp. 821 (page 55).
3. The volume of cases pending before the Court and the time it would take to clear the calendar (page 56).
4. Consideration of statistical data furnished by the defendant concerning other cases pending before that administrative agency (page 56).
5. Considering criminal prosecutions throughout the district during the years 1947 to 1950, inclusive (page 56).

It is submitted that the principles enunciated by the lower Court in the *Ly Shew* case are erroneous. Compare the decision of this Court in *Mar Gong v. Brownell,* No. 13,787, decided January 12, 1954; the

decisions of Judge Roche in *Ow Yeong Yung v. Dulles,* 116 F. Supp. 766, and *Lee Mon Hong v. McGranery,* 110 F. Supp. 682; and the decision of Judge Ford, United States District Court, Massachusetts, in the case of *Soo Hoo Yin Deep v. Dulles,* 116 F. Supp. 25.

At the conclusion of the trial in the case at bar the Court indicated that it believed the appellant was the lawful son of Chow Yit Quong, a recognized United States citizen. (T. 177.) However, it was concluded that the evidence presented did not meet the new special quantum of proof required by the *Ly Shew* decision.

In *Kwock Jan Fat v. White,* 253 U.S. 454, 464, 40 S. Ct. 566, 64 L. Ed. 1010, the Supreme Court stated:

> "It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from this country."

We submit that if the Court believes the appellant is the lawful blood son of a recognized United States citizen, there is no further issue for determination. Once that relationship is conceded the appellant must be recognized as a United States citizen pursuant to the statutes which were in effect at the time of his birth.

CONCLUSION.

We submit that the appellee's challenge to the jurisdiction of the trial Court in the case at bar is without merit. Appellee's objection to appellant's claim to permanent residence goes to the issue of venue and not jurisdiction of the Court. The statute, Section 903, permits the filing of such action in the District Court for the District of Columbia or in the district where the complainant "claims" a permanent residence. The complaint in the case at bar meets this requirement (T. 5.)

The appellee made a determination that the appellant is an alien. An alien is one who is not a citizen or national. The refusal of the appellee to admit the appellant into the United States as a citizen thereof was a denial of a right or privilege within the meaning of Section 903.

The burden of proof imposed upon the appellant by the trial Court (as indicated in its opinion in the case of *Ly Shew*) clearly manifests a miscarriage of justice. The issue should have been determined by reasonable judicial standards.

When the relationship was established, as indicated by the trial Court, the ultimate issue of this judicial proceeding was determined. A son of a recognized United States citizen is a United States citizen. The citizenship of this appellant was clearly established by the evidence and the findings of the trial Court to the contrary are erroneous.

Wherefore, it is respectfully submitted that the judgment of the lower Court be reversed.

Dated, San Francisco, California,
February 19, 1954.

Respectfully submitted,
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By JOSEPH S. HERTOGS,
Attorneys for Appellant.